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Issue Date: 18 September 2002

In the Matter of

James C. Mitchell,
Claimant

v.

The Daniels Company,
Employer

and

Director, Office of Workers'
Compensation Programs,
Party-In-Interest

Case No. 2002-BLA-186

DECISION AND ORDER

This proceeding arises from a claim for benefits under the Black Lung Benefits Act of 1977, 30 U.S.C. Section 901 *et seq.* In accordance with the Act and the regulations issued thereunder, the case was referred by the Director, Office of Workers' Compensation Programs for a formal hearing.

Benefits under the Act are awardable to miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of miners who were totally disabled at the time of their deaths (for claims filed prior to January 1, 1982), or to the survivors of miners whose deaths were caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as "black lung."

A formal hearing was scheduled before the undersigned on June 26, 2002 in Pipestem, West Virginia at which time all parties were afforded full opportunity in accordance with the Rules of Practice and Procedure (29 C.F.R. Part 18) to present evidence and argument as provided in the Act and the regulations issued thereunder. At the hearing, I admitted Administrative Law Judge Exhibits 1 through 4; Director's Exhibits 1 through 88; and Employer's Exhibits 1 through 9. On July 26, 2002, I issued an Order providing the parties with thirty days to file posthearing briefs; the Employer filed a brief on August 28, 2002. The findings and conclusions that follow are based upon an analysis of the entire record, together with applicable

statutes, regulations and case law, and representations of the parties.

JURISDICTION AND PROCEDURAL HISTORY

The Claimant filed his claim for benefits on January 8, 1997 (DX 1). He was awarded benefits in a Decision and Order issued by Administrative Law Judge Stuart Levin on May 18, 1999 (DX 40). The Employer appealed to the Benefits Review Board (Board), which issued a Decision and Order on June 28, 1999, remanding the claim to Judge Levin for further consideration as to whether the Claimant had established the existence of complicated pneumoconiosis (DX 59).

On December 5, 2000, Judge Levin issued his Decision and Order On Remand, finding that the Claimant had established the existence of complicated pneumoconiosis, and was entitled to benefits (DX 54, 65). The Employer appealed to the Board on December 29, 2000 (DX 68), but on April 27, 2001, filed a Motion to Remand for Modification Proceedings (DX 78). On May 7, 2001, the Board dismissed the Employer's appeal and remanded the claim to the Director for modification proceedings (DX 80).

On October 24, 2001, the Director issued his Proposed Decision and Order Denying Request for Modification, finding that the additional evidence submitted did not change the decision in the claim (DX 86). By letter dated November 8, 2001, the Employer contested this determination, and requested a hearing before an Administrative Law Judge (DX 87).

ISSUES PRESENTED

The contested issues are:

1. Whether the Claimant is a miner.
2. Whether the Claimant worked as a miner after December 31, 1969.
3. The length of the Claimant's coal mine employment.
4. Whether the Claimant has pneumoconiosis.
5. If so, whether the Claimant's pneumoconiosis arose out of his coal mine employment.
6. Whether the Claimant is totally disabled.
7. If so, whether the Claimant's total disability is due to pneumoconiosis.
8. Whether the Employer is properly named as the responsible operator.

(DX 88, Tr. 8). The Director contests only the issue of the length of the Claimant's coal mine employment.

NATURE AND SCOPE OF A MODIFICATION PROCEEDING

In evaluating a modification request based on an alleged change in conditions, an administrative law judge is required to undertake a *de novo* consideration of the issue by first

independently assessing the newly submitted evidence to determine whether it is sufficient to establish the requisite change in conditions. If a change is established, the administrative law judge must then consider all of the evidence of record to determine whether the claimant has established entitlement to benefits on the merits of the claim. *Kovac v. BNCR Mining Corp.*, 14 B.L.R. 1-156 (1990, *modified on reconsideration*, 16 B.L.R. 1-71 (1992)).¹ *See also*, *Nataloni v. Director, OWCP*, 17 B.L.R. 1-82 (1993) and *Kingery v. Hunt Branch Coal Co.*, 19 B.L.R. 1-8 (1994). In *Kingery*, the Board, citing its decisions in *Kovac* and *Nataloni*, described the proper scope of the *de novo* review of a modification request as follows:

[A]n administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision.

Id. at 11.

The Board has also held that the Administrative Law Judge should always review the record on modification to assess whether a mistake of fact has occurred. *Id.* In determining whether a mistake of fact has occurred, the Administrative Law Judge has broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted. *Jessee v. Director, OWCP*, 5 F.3d 723 (4th Cir. 1993).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact and conclusions of law which follow are based upon my analysis of the entire record, including all documentary evidence admitted and arguments made.

Background

The miner, James C. Mitchell, was born on March 9, 1941 (DX 1). He married his wife, Freda Atwell, on October 28, 1959. I find that the Claimant has one dependent for purposes of augmentation of benefits.

Status as Miner/Responsible Operator

In his May 18, 1999 Decision and Order, Judge Levin noted that at the informal hearing at the Office of Workers Compensation Programs (where the Employer appeared through corporate

¹ In its decision on reconsideration, the Board modified its holding in *Kovac* by stating that new evidence is not a prerequisite to a modification based on an alleged mistake in a determination of fact; rather, “[m]istakes of fact may be corrected whether demonstrated by new evidence, cumulative evidence, or further reflection on the evidence initially submitted.” *Id.* at 73.

officers), all of the parties had agreed that the Claimant was a coal miner within the meaning of the Act, and that he had 12 years of coal mine employment. Additionally, the parties agreed that the Employer was properly designated as the responsible operator (DX 40). Judge Levin noted that the Employer raised questions about the responsible operator issue at the hearing, where the Employer again appeared through corporate officers, and thus he reviewed the record, finding that the Employer was properly named as the responsible operator, and that the Claimant was exposed to coal dust in his employment with the Employer.

On appeal to the Board, the Employer argued that Judge Levin erred in conducting the hearing without advising the Employer of its right to representation, and in determining that the Employer was the responsible operator (DX 52). In its Decision and Order issued on June 28, 2000, the Board rejected these arguments, finding that “Inasmuch as employer failed to challenge the district director’s designation of it as the responsible operator, it is bound by the district director’s finding on the issue.”

The Board also stated:

Moreover, contrary to employer’s assertion, substantial evidence supports the administrative law judge’s determination that the record supports a conclusion that claimant did the work of a coal miner for employer and that employer was the responsible operator in this case. *See* 20 C.F.R. Sections 725.491, 725.492, 725.493. Pursuant to Section 725.492(c), a rebuttable presumption exists if:

...during the course of an individual’s employment such individual was regularly and continuously exposed to coal dust during the course of employment. The presumption may be rebutted by a showing that the employee was not exposed to coal dust for significant periods during such employment.

20 C.F.R. Section 725.492(c).

We conclude therefore that employer’s mere assertion that the total of 670 hours of coal mine employment during a twelve-year period does not constitute “significant” exposure fails to rise to the level of rebuttal. (Citations omitted.)

Decision and Order at 5, fn. 2.

In its subsequent Brief on Remand, the Employer presented no argument with respect to the status of the Claimant as a miner, or the status of the Employer as the responsible operator, nor did Judge Levin address these issues in his December 5, 2000 Decision and Order on Remand (DX 64, 65). However, in its brief submitted to the Board in support of its petition for review of Judge Levin’s December 5, 2000 Decision and Order, the Employer again raised these issues (DX 74). In its petition for modification, the Employer alleged that Judge Levin erred in his factual determinations that the Claimant worked as a miner, and that the Employer was the responsible

operator (DX 79). In support of its petition for modification, the Employer submitted, *inter alia*, an affidavit by Brenda Hager, the Personnel Director and Executive Assistant to the President of the Employer, and an affidavit by J. Paul Kulzer, Jr., the Treasurer of the Employer (DX 83). Ms. Hager previously testified at the hearing before Judge Levin.

In its post-hearing brief submitted in connection with this modification proceeding, the Employer argues that the previous findings in respect to whether the Claimant was a miner, his length of coal mine employment, and the Employer's status as the responsible operator must be modified, since they were a mistake of fact. The Employer relies on the affidavits by Ms. Hager and Mr. Kulzer, as well as the Claimant's testimony in a deposition conducted in preparation for the current modification hearing.

The Employer's argument ignores the fact that the Board has already ruled on these issues, finding that, not only was the Employer bound by its stipulations in the informal conference, but substantial evidence supported Judge Levin's determination that the record supports a conclusion that the Claimant did the work of a coal miner for the Employer, and that the Employer was the responsible operator. These findings are the "law of the case," and cannot be challenged by the Employer with a petition for modification. This principle is based upon the notion that once an issue is litigated and decided, it should not be relitigated. *United States v. U.S. Smilting Refining & Mining Co.*, 339 U.S. 186 (1950), *reh'g denied*, 339 U.S. 972 (1950). Thus, in *Brinkley v. Peabody Coal Co.*, 14 B.L.R. 1-147 (1990), the Board held that rebuttal under §§ 727.203(b) was precluded where it previously affirmed the judge's finding that the employer failed to demonstrate such rebuttal in an earlier decision and no exception to the doctrine was established. *See also Dean v. Marine Terminals Corp.*, 15 B.R.B.S. 394 (1983). Departure from the "law of the case" doctrine is appropriate where the prior holding is "clearly erroneous" and its continued application would constitute a "manifest injustice." *Cale v. Johnson*, 861 F.2d 943, 947 (6th Cir. 1988) (citing to *Arizona v. California*, 460 U.S. 605 (1983)).

Here, there has been no showing that Judge Levin's findings were clearly erroneous, and that their continued application would constitute a manifest injustice. Thus, in connection with its modification request, the Employer has submitted an affidavit by Ms. Hager, stating that she reviewed all of the records of the Employer concerning the wages and hours of the Claimant, and attaching a chart setting out that information. According to her, the Claimant worked a total of 670 hours at coal mine sites from 1979 through 1986. But this is not new evidence; it is simply a different version of her testimony at the hearing. More importantly, the records from which she made her calculations were available at the hearing before Judge Levin. The affidavit by Mr. Kulzer states that Mesa Engineering, Inc., is owned by the Daniels Company, but exists only as an "arm" to serve shop employees who travel to a client's work site, and to pay the employees under the United Mine Workers' wage rate. This information was also provided to Judge Levin in the original hearing. Nor does the Claimant's deposition testimony provide any new information, or information that was not available previously.

The Employer had ample opportunity, at the hearing before Judge Levin, to put on evidence with respect to the issues of miner, length of coal mine employment with the Employer,

and responsible operator.² Judge Levin determined that the evidence of record supported a conclusion that the Claimant worked as a coal miner for the Employer for 12 years, and that the Employer was the responsible operator, and these findings were affirmed by the Board. I find that Judge Levin's findings were not clearly erroneous, nor would it constitute a manifest injustice to consider them as the "law of the case." Thus, I find that the Claimant was a miner, that he was employed as a miner by the Employer for 12 years, and that the Employer is properly designated as the responsible operator.

Mistake of Fact

In his December 5, 2000 Decision and Order On Remand, Judge Levin found that the Claimant had established the existence of complicated pneumoconiosis by virtue of the x-ray evidence, under 20 C.F.R. Section 718.304(A), and that there was no evidence that diminished the probative value of that x-ray evidence. In determining whether a mistake of fact has occurred, I must determine whether the new evidence submitted by the Employer, considered with the evidence as a whole, affirmatively shows that the Claimant does not have a condition of such severity that it would produce opacities greater than one centimeter in diameter on an x-ray, or, that those opacities are not what they seem to be. As the Fourth Circuit stated in *Eastern Associated Coal Corporation v. Director, OWCP*, (4th Cir. 2000),

Of course, if the x-ray evidence vividly displays opacities exceeding one centimeter, its probative value is not reduced because the evidence under some other prong is inconclusive or less vivid. Instead, the x-ray evidence can lose force only if other evidence affirmatively shows that the opacities are not there or are not what they seem to be, perhaps because of an intervening pathology, some technical problem with the equipment used, or incompetence of the reader.

Id. at

The following new medical reports are in the record.

Dr. Gregory J. Fino

Dr. Fino reviewed the Claimant's medical records at the request of the Employer, and

² The Employer appears to be attempting to correct the actions of Ms. Hager and Mr. Knight, who appeared on the Employer's behalf at the informal conference and the hearing before Judge Levin. However, it was the Employer's decision to proceed without counsel, and the Employer is not entitled to use a petition for modification to back out of the stipulations it entered into at the informal conference. See, e.g., *Richardson v. Director, OWCP*, 94 F.3d 164 (4th Cir. 1996)(Employer's stipulation is binding [regarding the presence of coal workers' pneumoconiosis] even though the presence of the disease was not "manifest from the medical records.")

prepared a report dated April 8, 2002 (EX 3). Dr. Fino concluded that the chest x-rays clearly showed a significant abnormality, and that based on the readings, simple and complicated pneumoconiosis would have to be considered. However, in light of information he had received, documenting only 130 days of work in a non-operational coal preparation plant over 15 years, Dr. Fino concluded that the x-ray abnormalities were not, and could not be due to coal mine dust inhalation. According to Dr. Fino, even if the Claimant's work were at the face, exposure of 130 days would be insufficient to produce the dramatic changes seen on his x-ray, and in fact, that degree of exposure was insufficient to cause any type of coal dust related pulmonary condition.

Dr. Fino noted that the Claimant had been treated empirically for tuberculosis and had improved, strongly suggesting that the changes on his x-ray represent old tuberculosis. He also speculated that the changes could be due to fungal infections or sarcoidosis. But they were not due to a coal mine dust related pulmonary condition.

Dr. Fino noted that there was very mild obstruction as shown by the pulmonary function studies, but no significant ventilatory impairment. The Claimant's diffusing capacity was mildly reduced, but he had normal blood gas results at rest and with exercise. He had only a minimal impairment in oxygen transfer. According to Dr. Fino, these impairments would not prevent him from performing heavy manual labor. They are consistent with smoking related emphysema.

Dr. Fino concluded that there was no evidence of simple or complicated pneumoconiosis. The Claimant has a minimal respiratory impairment due to smoking, or possibly in part due to pulmonary changes, but it is not disabling. He also stated that, even if the Claimant were found to have 15 years of coal mine employment, his opinions would not change.³

Dr. Fino also reviewed a CT scan of the Claimant's chest, dated February 7, 1997 (EX 5). He noted the presence of multiple small nodular lesions throughout both lungs, with a 2 cm. nodule in the left upper lung zone. However, based on the information that he was provided about the Claimant's work history, that is, 130 days of exposure in a preparation plant over 15 years, he felt that there were no changes consistent with a coal mine dust associated occupational lung disease.

Dr. Cristopher A. Meyer

Dr. Meyer reviewed chest x-rays dated June 27, 2001 and August 1, 2001, and a CT scan dated June 27, 2001, at the request of the Employer (EX 6). He found that the chest x-rays showed a background of upper mid lung zone nodules, primarily r, q, with a profusion of 3/3, and a B-sized large opacity in the right upper lung zone. The CT scan confirmed the nodular pattern

³ As he acknowledged that the x-rays required consideration of simple and complicated pneumoconiosis, and the basis for Dr. Fino's conclusion that the Claimant could not have complicated pneumoconiosis was his assumption that the Claimant worked only 130 days in a coal mine, this conclusion is difficult to understand.

and the large opacity in the right upper lobe. Dr. Meyer's impression was:

Diffuse nodular opacities in a perilymphatic distribution. These are upper zone predominant in location with an area of conglomerate mass in the right apex. Considerations would include complicated pneumoconiosis (ie. progressive massive fibrosis or silicosis). Alternatively, sarcoidosis may have a similar appearance. By history, this patient has only 130 days of coal dust exposure. It is unreasonable to expect that this minimal amount of exposure would result in the described picture of complicated pneumoconiosis.

Dr. Meyer felt that further history should be obtained, to see if the Claimant had other occupations with silica exposure. He stated that 130 days of coal dust exposure would not result in the radiographic appearance presented by the Claimant's films. According to Dr. Meyer, lung biopsy was the only definitive way to establish a diagnosis.

Dr. Ben V. Branscomb

Dr. Branscomb reviewed the Claimant's medical records at the request of the Employer, and prepared a report dated May 24, 2002 (EX 7). According to Dr. Branscomb, if the Claimant's coal dust exposure was only 130 days, or 670 hours, it would be completely impossible for him to acquire medical or legal pneumoconiosis. However, even assuming that the Claimant had a sufficient exposure to coal dust to produce pneumoconiosis, he concluded that there was insufficient objective evidence to justify a diagnosis of either pneumoconiosis, or any disorder or impairment caused or aggravated by coal mine dust exposure.

Dr. Branscomb also felt that the Claimant had no significant pulmonary impairment, and indeed the pulmonary function studies objectively established that he had no pulmonary impairment at all. Even if he were to assume that the shadows on his x-rays were the result of pneumoconiosis, he still concluded that the Claimant was not disabled from performing his previous job.

Dr. Jerome F. Wiot

Dr. Wiot prepared a report dated April 2, 2002, indicating that he had reviewed information concerning the Claimant's work history, as well as his original report dated June 29, 2001 (EX 4). Dr. Wiot was of the understanding that the Claimant had only approximately 130 days of coal dust exposure over a 15 year period. He stated that with this length of exposure, no matter how severe the dust, the findings in his original report were certainly not coal workers' pneumoconiosis. He noted that the radiographic manifestations of pneumoconiosis are similar in appearance to many other disease processes, and clinical information is important in determining the etiology of the process.

Dr. Wiot referred to "round three" of the NIOSH National Coal Workers Study regarding the incidence of pneumoconiosis in various categories of coal miners. He stated that in miners

with 0-9 years of exposure, the incidence of progressive massive fibrosis was zero. Dr. Wiot concluded that the information he received about the Claimant's coal dust exposure was strong evidence that there was some disease process present other than pneumoconiosis, and that the etiology could be determined only by lung biopsy.

Dr. Wiot also testified by deposition on June 21, 2002 (EX 9). He had been provided with additional x-rays, specifically, studies dated May 13, 1999, June 27, 2001, and August 1, 1997. He also reviewed a CT scan performed on June 27, 2001, and February 7, 1997. According to Dr. Wiot, he was not aware of the Claimant's coal dust exposure history when he originally read the Claimant's x-ray of February 4, 1997, which he classified as simple pneumoconiosis, 2/3, r, q. He also found coalescence of pneumoconiotic nodules in the right upper lung field. Because some of the nodules showed calcification, he stated that there was probably also granulomatous disease.

Viewing the May 13, 1999 x-ray, Dr. Wiot stated that there was a large opacity in the right upper lung, with more q's than r's. According to Dr. Wiot, if he knew nothing about this individual's exposure, he would have to assume that it was complicated pneumoconiosis. But after he was provided with information about the Claimant's work history, 130 days of exposure over a 15 year period, it was impossible for it to be coal workers' pneumoconiosis. Dr. Wiot stated that with that amount of exposure, it was not possible to develop pneumoconiosis, particularly complicated pneumoconiosis. He felt that sarcoidosis was a strong possibility, because, in its advanced stages, it can look exactly like coal workers' pneumoconiosis.

According to Dr. Wiot, the 1997 CT scan showed nodules compatible with simple coal workers' pneumoconiosis, as well as a large opacity on the right, and the suggestion of a small large opacity on the left. If the Claimant had 20 years of exposure, he would say that it probably was complicated pneumoconiosis, but given the Claimant's history of exposure, it could not be pneumoconiosis. In Dr. Wiot's opinion, the Claimant suffers from sarcoidosis, a condition not related to exposure to coal mine dust.

Dr. Harold B. Spitz

Dr. Spitz reviewed records at the request of the Employer, and prepared a report dated April 25, 2002 (EX 4). He noted that all of the studies showed diffuse abnormality of the lungs, which could be compatible with pneumoconiosis given a long history of exposure to coal dust. However, 130 days of coal dust exposure over 15 years, as he was informed the Claimant had, was incompatible with the chest x-ray findings. He did not believe that, even if the Claimant had two years of coal dust exposure, there would be the changes as shown on his x-rays. As a result, he did not believe that the Claimant had complicated coal workers' pneumoconiosis, and stated that there must be some other etiology. He noted that there were other etiologies for pulmonary nodules, even for large areas of pulmonary fibrosis. According to Dr. Spitz, a lung biopsy could resolve the question, and it also would be helpful to review the length of the Claimant's exposure to coal dust.

Dr. George L. Zaldivar

Dr. Zaldivar testified by deposition on June 19, 2002 (EX 8). He indicated that when he examined the Claimant in August 2001, he obtained the Claimant's history of coal dust exposure from the Claimant. However, after he reviewed all of the medical records, he obtained different information. In reviewing the Claimant's x-ray, Dr. Zaldivar found heavy calcification over the vast majority of the nodules, which is not consistent with pneumoconiosis. It is, however, consistent with an infectious process. He acknowledged that it was possible to have a combination of processes, with pneumoconiosis, and another process causing the calcified nodules, but it was preferable to look for one explanation for the entire case rather than to bring in several components or illnesses.

According to Dr. Zaldivar, the Claimant's x-ray fit primarily an individual with an infectious process that has resulted in heavy calcification of the nodules, and thus a differential diagnosis of tuberculosis or histoplasmosis. When he was informed that the Claimant had only about one hundred hours of work with direct exposure to coal dust, he stated that coal workers' pneumoconiosis could be excluded "right off the bat" as the cause of the x-ray abnormality. He stated that it takes an average of ten years of heavy dust exposure to inhale dust sufficient to produce these abnormalities.

Dr. Zaldivar referred to his examination of the Claimant in August 2001, noting that, as shown by the pulmonary function test results, he had a moderate, irreversible airway obstruction, which did not necessarily translate into a moderate impairment. His diffusion capacity was mildly reduced, with no clinical consequences. His arterial blood gas studies were normal. He would not expect to see these results in a person with "really, really bad" pneumoconiosis. Dr. Zaldivar felt that the Claimant's obstruction was due to his 25 year smoking habit, as was his mild diffusion impairment. He also felt that the Claimant had had a severe infection that had resulted in lung damage, apparently tuberculosis, according to the records. This is what caused the x-ray appearance, as well as the minimal diffusion abnormality, and it may have contributed to the airway obstruction.

Dr. Zaldivar noted that the Claimant had developed aseptic meningitis, which in itself does not require treatment, but that his doctors thought it prudent to treat him for tuberculosis. Dr. Zaldivar felt that the physicians put together the x-rays and overall clinical picture, in deciding to treat the Claimant for tuberculosis. According to Dr. Zaldivar, the medical records clearly showed that the Claimant had tuberculosis, which was affecting his brain. His x-ray had nothing to do with his exposure to coal dust, but had to do with tuberculosis, which caused the radiographic changes. This was confirmed by the CT scan, which showed that all of the densities were heavily calcified, consistent with an infectious process. He acknowledged that there were masses in the periphery of the upper zones, but stated that this was typical of an infectious process, and not pneumoconiosis, which is more centrally located, and flatter rather than rounder.

Dr. Zaldivar concluded that, viewing the CT scan, the x-ray, and the history, this was a case of disseminated tuberculosis, or miliary tuberculosis radiographically, with meningitis as a

result. Dr. Zaldivar was asked to view the February 4, 1997 x-ray, without knowing anything about his history. According to Dr. Zaldivar, it was similar to an ILO film of 3/3, r, r, with some heavily calcified densities not due to pneumoconiosis. He felt that some, but not all of the densities, would be pneumoconiosis, with something else going on, but that pneumoconiosis could not be excluded. He noted that there was a density in the right upper zone more than one centimeter in diameter that could be complicated pneumoconiosis. However, considering the information he was provided about the Claimant's length of coal dust exposure, and other health problems from 1998, he felt that the x-ray changes clearly were not due to pneumoconiosis, but to tuberculosis.

According to Dr. Zaldivar, the Claimant does not have pneumoconiosis, simple or complicated, or any lung disease related to his coal dust exposure.

Testimony of the Claimant

The Claimant testified by deposition on March 20, 2002 (EX 1). He responded to detailed questions from the Employer regarding his work history, as reflected on Ms. Hager's chart, and in his Social Security earnings report.

DISCUSSION

In his December 2000 Decision and Order on Remand, Judge Levin determined that the Claimant has complicated pneumoconiosis, and thus is entitled to the statutory presumption of total disability due to pneumoconiosis. The Employer argues that, based on the evidence submitted in connection with its modification request, these findings were a mistake of fact, and the Claimant should be denied benefits.

There is no question that the Claimant's x-rays show opacities of greater than one cm., and this is confirmed by all of the physicians who provided new medical opinion evidence. With the exception of Dr. Branscomb, each of the physicians whose reports were submitted by the Employer has acknowledged that the abnormalities on the Claimant's chest x-rays and CT scans, at the least, make both simple and complicated pneumoconiosis a "consideration." However, based on the information provided to them by the Employer, that is, that the Claimant had only 670 hours of coal dust exposure over a 15 year period, these physicians stated that the abnormalities on the Claimant's x-rays cannot reflect a diagnosis of pneumoconiosis, because it is impossible to develop pneumoconiosis, simple or complicated, with such an amount of coal dust exposure.

In his original Decision and Order, issued May 18, 1999, Judge Levin noted that the records provided by the Employer from 1979 forward showed that the Claimant, who did repair and construction work on-site at tipples, worked at least 670 hours at the tipples. However, these records do not predate 1979, and the Claimant's Social Security earnings records show that he began his employment in 1966. Again, as Judge Levin noted, the testimony of the Claimant and Mr. Knight showed that the Claimant was exposed to coal dust when he worked at the tipples.

This is also consistent with the Claimant's testimony in his recent deposition. The regulations provide that there is a rebuttable presumption that during the course of an individual's employment, he was regularly and continuously exposed to coal dust. 20 C.F.R. Section 725.492(c). In order to rebut this presumption, the Employer must establish that there were no significant periods of coal dust exposure. *Conley v. Roberts & Schaefer Coal Co.*, 7 B.L.R. 1-309 (1984). The frequency of exposure must be so slight that employment with the Employer could not have caused pneumoconiosis. *Richard v. C & K Coal Co.*, 7 B.L.R. 1-372 (1984).

Thus, even assuming the accuracy of Ms. Hager's calculations of 670 hours, as noted by Judge Levin, they do not account for a significant period of time when the Claimant was employed as a miner with the Employer. Ms. Hager calculated the hours worked by the Claimant at coal mine sites between 1979 and 1986, noting that she had been able to collect and review all of the documents reflecting the Claimant's hours of work, with the exception of documents from 1978 and 1979 that may have been lost or destroyed in a flood. However, this does not take into account the years from 1966 to 1978, and 1987 and 1988, when the Claimant's social security earnings records reflect that he worked for the Employer. It is not sufficient to establish that the Claimant had no significant periods of coal dust exposure, or that the frequency of his coal dust exposure was so slight that it could not have caused pneumoconiosis.

It follows that the opinions from Dr. Wiot, Dr. Branscomb, Dr. Fino, Dr. Meyer, and Dr. Zaldivar are not sufficient to affirmatively show that the opacities on the Claimant's x-ray do not represent complicated pneumoconiosis, because they are based on information supplied by the Employer that reflects the minimum amount of the Claimant's exposure while employed by the Employer. Indeed, the opinions of these physicians support a finding not only that the abnormalities on the Claimant's x-ray qualify as complicated pneumoconiosis, but that the Claimant, who had no exposure to coal dust or silica in any other employment, was regularly and continuously exposed to coal dust.

In his report, Dr. Branscomb summarized the medical records at length, but his own conclusions take up less than a page of his report. He stated that with only 670 hours of coal dust exposure, it would be impossible to acquire pneumoconiosis, legal or medical. Nevertheless, he stated that if he were to assume that the coal dust exposure was sufficient to acquire pneumoconiosis, he still would conclude that there was insufficient objective evidence to justify a diagnosis of pneumoconiosis or any disorder or impairment caused or aggravated by coal mine dust exposure. Dr. Branscomb did not offer any supporting rationale for this bald conclusion, or cite to any of the medical evidence in support. Nor did he address the nature of the abnormalities on the Claimant's x-rays, which were acknowledged in all of the records he reviewed, other than to note that progressive calcification of pulmonary lesions is consistent with residual old granulomatous disease, a statement that says nothing about the existence of pneumoconiosis. Dr. Branscomb did state that, even if the shadows on the Claimant's x-ray were pneumoconiosis, he still would conclude that he was not disabled. He did not say that the shadows would not qualify as complicated pneumoconiosis, and of course it is not necessary that a Claimant prove disability to be entitled to the presumption of Section 718.304.

In short, the Employer has offered medical opinions that are based on an assumption that the Claimant had only 670 hours of coal dust exposure, contrary to its earlier stipulation of 12 years, when in fact the Employer has not established that there were no significant periods of coal dust exposure, and thus has not rebutted the regulatory presumption that the Claimant was regularly and continuously exposed to coal dust during the course of his employment with the Employer. Thus, I find that the new medical opinion evidence does not affirmatively show that the opacities on the Claimant's x-ray are not there, or are not what they seem to be, that is, complicated pneumoconiosis.

I have reviewed the newly submitted evidence, as well as the previous evidence of record. I find that there was no mistake of fact in Judge Levin's determination that the Claimant established the existence of complicated pneumoconiosis by x-ray evidence, and thus he is entitled to benefits.

ORDER

Based on the foregoing, IT IS ORDERED that the Employer pay to James C. Mitchell all benefits under the Black Lung Benefits Act, commencing on January 1, 1997.

SO ORDERED.

A

LINDA S. CHAPMAN
Administrative Law Judge

ATTORNEY FEES

An application by Claimant's attorney for approval of a fee has not been received. Thirty days is hereby allowed to Claimant's counsel for submission of such an application. A service sheet showing that service has been made upon all the parties, including the claimant, must accompany the application. The parties have ten days following receipt of any such application within which to file any objections. The Act prohibits the charging of a fee in the absence of an approved application.

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 (thirty) days from the date of this decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box

37601, Washington, D.C. 20013-7601. *A copy of a Notice of Appeal must also be served on the Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.*